

**PROCEDURES FOR IMPLEMENTING THE  
FREEDOM OF INFORMATION ACT**

- 1. REASON FOR ISSUE:** This handbook provides Department-wide procedures that implement the policies contained in VA Directive 6300, Records and Information Management, for processing requests for records under the Freedom of Information Act (FOIA).
- 2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This handbook provides procedures for implementing FOIA, including new requirements of the Electronic FOIA Amendments of 1996 (Pub. L. 104-231).
- 3. RESPONSIBLE OFFICE:** The Information Management Service (045A4), Office of the Deputy Assistant Secretary for Information Resources Management, is responsible for the material contained in this handbook.
- 4. RELATED DIRECTIVE AND HANDBOOK:** VA Directive 6300, Records and Information Management, and VA Handbook 6300.1, Records Management Procedures.
- 5. RESCISSION:** OI-1, Part I, Chapter 9, dated January 9, 1985.

**CERTIFIED BY:**

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## **PROCEDURES FOR IMPLEMENTING THE FREEDOM OF INFORMATION ACT**

**1. PURPOSE.** This handbook sets forth procedures for implementing the Freedom of Information Act (FOIA) (5 U.S.C. 552). VA's regulations implementing FOIA are published in 38 CFR 1.550 through 1.559. Definitions of terms used in FOIA and brief descriptions of each FOIA exemption are provided. The requirements and instructions for preparing the annual report of compliance with FOIA are also included.

### **2. RESPONSIBILITIES**

a. The Deputy Assistant Secretary for Information Resources Management (DAS/IRM) will designate a Department FOIA and Privacy Act (PA) Officer.

**b. The responsibilities of the Department FOIA/PA Officer are:**

(1) Providing advice, assistance, and recommendations to the DAS/IRM regarding policies, procedures, and other requirements governing FOIA and its implementation.

(2) Publishing an annual list of employees in Central Office who are designated as FOIA and PA Officers.

(3) Establishing procedures, reporting requirements, and formats for monitoring the Department's administration of FOIA.

(4) Reviewing and transmitting FOIA requests to the appropriate administration or staff office FOIA officers to which the request applies.

(5) Responding to requests that require information from two or more Central Office organizational elements, which includes obtaining the necessary information and data from the other offices.

(6) Preparing the Department annual FOIA report for submission to the Department of Justice.

(7) Establishing procedures for implementing and maintaining VA's electronic reading room, including establishing and maintaining an index of information in the reading room.

(8) Assisting VA offices in obtaining technical assistance in placing records in the electronic reading room.

**c. Administration Heads, Assistant Secretaries, and Other Key Officials will:**

(1) Designate one or more FOIA/PA Officer(s) who will be responsible for initial action on requests for release of information from VA records under the jurisdiction of that office and for complying with the provisions of this handbook.

(2) At the discretion of the Administration Head, Assistant Secretary or Other Key Officials, the responsibilities and duties of the designated employee(s) may be delegated to individuals within the various elements of their respective offices. However, compliance by the primary organizational element will be the responsibility of the designated employee(s).

(3) Report the name(s), title(s) and location(s) of the employee(s) designated to the Information Management Service (045A4).

(4) Ensure that reasonable efforts are taken to maintain records in formats that are reproducible for purposes of FOIA. VA must provide records in the format requested if the record is “readily reproducible” in that format.

**d. The responsibilities of the FOIA Officers are:**

(1) Being familiar with all laws and VA regulations concerning the release of information. The Office of General Counsel can provide legal assistance.

(2) Reviewing all initial requests for records submitted under FOIA and making a determination to grant or deny the request.

(3) Ensuring that responses to FOIA requests include the following:

(a) The name and title of the denying official.

(b) When information is withheld, the FOIA exemption should be written next to the deletion. If the extent of the deleted information is not apparent (e.g., when a number of entire pages have been withheld), the response must indicate the volume of information withheld.’

(c) A full description of how and where to file an appeal.

(4) Maintaining a listing of FOIA requests received. VA Form 70-7259, Action on Request Under Freedom of Information Act, may be used.

(5) Determining whether to charge the requester fees for complying with a request.

(6) Preparing any reports required or responding to FOIA questions as necessary.

(7) Providing space to permit public review of records subject to FOIA, including access to the VA electronic reading room.

(8) Determining, with appropriate program officials, which records in response to a FOIA request have become or are likely to become the subject of repeated requests for essentially the same records and ensuring that these records are placed in the electronic reading room (5 U.S.C. 552(a)(2)(D)). The Department of Justice has advised that an agency should consider documents for reading room treatment if three or more requests for the same records have been received. However, if three or more requests for essentially the same records are all received within a very short period of time and no future requests are reasonably anticipated, then reading room treatment is not required.

(9) Providing the VA FOIA Officer with information to be included in the electronic index of records placed in the electronic reading room.

(10) Providing the VA FOIA Officer with copies of responses to requests forwarded by the VA FOIA Officer.

e. **Handling Requests:**

(1) **Requests for Records.** Requests for identifiable records in VA custody, or copies thereof, other than published administrative issue materials made available to the public, will be in writing. Such requests are often received by the Central Office mail room. They may be addressed to the Secretary, by name or title; to a specific office; to the VA FOIA or PA Officer; or simply to the Department of Veterans Affairs. In some cases, the outer envelope will indicate the correspondence is a "FOIA" or "Privacy Act" request.

(2) **Initial Routing of Requests.** Following established mail room procedures and practices, Central Office mail room personnel will, to the maximum extent possible, route the requests to the organizational element having jurisdiction over the subject matter of the request. In those cases where a specific office cannot be identified as having primary responsibility for the subject matter, the correspondence will be sent from the Central Office mail room to the Information Management Service (045A4) for review and appropriate forwarding for reply.

(3) Requests that require information from two or more Central Office organizational elements will be sent to the Information Management Service (see paragraph 2b(5)).

(4) In all cases in which the incoming FOIA request indicates it is an appeal of a decision of an earlier request, Central Office mail room personnel will route the correspondence directly to the Office of General Counsel (024). Any office receiving a FOIA request that is determined to be an appeal will immediately forward the request to the Office of General Counsel (see paragraph 6).

### 3. PROCESSING FOIA RECORD REQUESTS

a. **General.** The procedures in VA regulations 38 CFR 1.553 through 1.559 will be followed when receiving, processing, and replying to FOIA requests.

b. **Electronic Records.** Agency records maintained in an electronic format are records subject to FOIA.

(1) When searching for records, FOIA Officers should routinely consider e-mail, records on personal computers and diskettes, management information systems (e.g., shared electronic systems such as local area networks and wide area networks) as well as other electronic records.

(2) Requesters may ask for records in any form or format. VA may rely on the assumption that FOIA requesters want paper records, unless the request or circumstances related to the request would reasonably create a doubt about the validity of the assumption. Such would be the case if the request otherwise specified or the request suggests that the requester seeks information on what formats are available. Clarification should be made in those instances.

(3) VA must make reasonable efforts to maintain records in forms or formats that are reproducible for FOIA purposes. If a requester seeks VA records maintained in multiple formats, the format requested is to be used in the disclosure.

(4) VA must make reasonable efforts to search for records kept in an electronic format as well as maintained on paper. An exception is when searching would significantly interfere with the operation of VA's automated information system.

c. **Time Limitation.** Particular attention will be made to ensure that responses to FOIA requests are provided within the time limits specified in 5 U.S.C. 552(a)(6)(A) - (F). VA Form Letter (FL) 70-16, Postal Card Acknowledgment of Request Under the FOIA, may be used when

an extension of the time period for making an initial determination to comply with a FOIA request is needed.

d. **Fax Requests.** VA may process a faxed request as long as the request bears a signature. VA reserves the right to request proof of identity under certain circumstances such as when the records implicate the personal privacy interest of the requester.

e. **Electronic Mail (E-mail) Requests.** E-mail requests will not be processed because requests must be in writing; i.e., written on paper with a signature.

f. **Determining which FOIA requests for records should be coordinated with litigating attorneys.**

(1) If there is a possibility that a request involves records or information that may be related to a matter in litigation or that may result in litigation, advice and assistance will be requested from the Regional Counsel or Office of General Counsel.

(2) While it is not possible to specifically identify all types of requests that may be related to ongoing or anticipated litigation, the following general categories may often need to be identified to the Regional Counsel or Central Office staff attorneys:

(a) Requests for records relating to medical malpractice cases and other cases that may result in or have tort claims pending;

(b) Requests for records involving or related to adverse personnel actions;

(c) Requests for records concerning contracts that are in dispute or are controversial;

(d) Requests for records relating to school liability cases;

(e) Requests that contain statements or other information saying a court case is pending, is contemplated, or is already being litigated; or

(f) Requests for records involving situations, events, or occurrences that are recognized as or appear to be of such a controversial or serious nature that litigation may result.

g. **Coordinating requests related to litigation or anticipated litigation.**

(1) Notices of the filing of litigation are generally received by Regional Counsels or attorneys in the Office of General Counsel. Regional Counsels or Central Office staff attorneys will distribute notices of the litigation to those offices identified as having jurisdiction over any related FOIA request as appropriate. The notification will include a request that the Regional Counsel or a Central Office staff attorney be advised of any FOIA request that could be construed as a request for documents pertaining to the subject matter of anticipated or ongoing litigation. These notifications may be accomplished by sending a copy of the Summons and Complaint, with a standard cover letter, referral memorandum, or any other method determined to be appropriate.

(2) Upon receipt of a litigation notification, the individual(s) responding to any FOIA requests will ensure that pertinent information concerning any related request is forwarded to the Regional Counsel or Central Office staff attorney. If the individual(s) responding to FOIA requests believes that the requested records may pertain to anticipated or pending litigation, the Regional Counsel or Central Office staff attorney must be notified of the request. The



individual(s) responding to FOIA requests will also advise of the proposed reply or request legal advice and assistance about the content of the reply.

(3) When informed of litigation-related FOIA requests, the Regional Counsel or Central Office staff attorney will pass that information to the U.S. Attorney. The U.S. Attorney will be advised of the likely disposition of the request.

(4) When Central Office staff attorneys are responsible for litigation involving documents that are the subject of a FOIA request and that are exclusively within the custody of a field office, the staff attorney will notify the appropriate Regional Counsel of the FOIA request. If the documents are within the custody of both the Central Office and field facility(ies)/activity(ies), the staff attorney will notify the appropriate Central Office organizational element(s) and the appropriate Regional Counsel(s).

(5) When it is determined that a FOIA request relates to litigation or anticipated litigation, a complete and accurate copy of the FOIA reply and copies of records released will be given to the Regional Counsel or Central Office staff attorney so that the attorney will know precisely what documents have been released and can advise the U.S. Attorneys as necessary. In addition, the Regional Counsel or Central Office staff attorney will provide advice and assistance regarding the applicability of FOIA exemptions. For example, the marking of documents that should be classified as "attorney work product."

h. **White House Records in VA Files.** Records originating with or involving any part of the White House Office should be forwarded through the Director, Executive Secretariat to the Office of the Counsel to the President for recommendations or comments prior to final response to the requester. The Counsel's Office should be advised of any sensitivity the records have for VA and whether any FOIA exemptions are considered to apply. The records should be marked according to any FOIA exemptions that may apply. A courtesy copy of the transmittal should be included for the Director, Executive Secretariat.

#### **4. EXEMPTIONS FROM PUBLIC ACCESS TO AGENCY RECORDS**

a. **General.** It is general policy to disclose information from Department records to the maximum extent permitted by law. There are circumstances, however, when VA is not required to disclose a record in response to a FOIA request or may be precluded by law from disclosing a record. When such an occasion arises, FOIA permits records or information, or segregable portions thereof, to be withheld under any of nine exemptions. These exemptions may be invoked in denying a request only after careful review and consideration of all factors surrounding the request. Even if an exemption applies, however, VA should disclose the information anyway, unless there is an articulable or foreseeable harm of the type protected by the exemption or a statute that precludes disclosure.

b. **The FOIA Exemptions are:**

(1) **Exemption Number 1 (5 U.S.C. 552(b)(1))** permits withholding information that is classified for national security purposes. VA has a limited number of these records.

(2) **Exemption Number 2 (5 U.S.C. 552(b)(2))**. Records or manuals reflecting investigatory techniques and procedures may be withheld under this exemption when their release might enable a requester to circumvent regulations applying to an investigation of the requester.

(3) **Exemption Number 3 (5 U.S.C. 552(b)(3))** permits withholding of records or information if a law specifically exempts the material from disclosure. VA may use this

exemption when the requested records or information are covered by VA's Confidentiality Statutes, 38 U.S.C. 5701, 5705, and 7332; the Inspector General Act of 1978; or 35 U.S.C. 205. Information or records will not be withheld by citing the Privacy Act. For VA purposes, only five public laws are usually invoked to withhold records under Exemption No. 3. The following is a brief description of the information withholding features of each statute and public law applicable to VA:

(a) **38 U.S.C. 5701, "Confidential Nature of Claims."** This provision appears to prohibit the disclosure of files, reports, records, and other documents and papers that pertain to any claim filed under any laws administered by VA. However, for purposes of FOIA, subsection 5701(a), authorizes withholding only of names and addresses of present and former members of the Armed Forces, and their dependents.

(b) **38 U.S.C. 5705, "Confidentiality of Medical Quality Assurance Records"** prohibits the disclosure of records and documents created by VA as part of a medical quality assurance program. These records are created by VA medical centers as part of the Veterans Health Administration (VHA) medical quality assurance program.

(c) **38 U.S.C. 7332, "Confidentiality of Certain Medical Records"** prohibits the disclosure of records that contain the identity, diagnosis, prognosis, testing or treatment of any patient in connection with drug abuse, alcoholism or alcohol abuse, human immunodeficiency virus, or sickle cell anemia.

(d) **35 U.S.C. 205, "Confidentiality"** authorizes Federal agencies to withhold information pertaining to any invention in which the Federal government owns or may own a right, title, or interest.

(e) **Inspector General Act of 1978 (Pub. L. 95-452), Section 7, "Complaints by Employees; Disclosure of Identity; Reprisals"** prohibits the Inspector General from disclosing the identity of an employee, without his or her consent, when that employee has filed a complaint with or provided information to the Inspector General, such as "whistleblowing." The Inspector General may determine that such disclosure is unavoidable during the course of an investigation.

(4) **Exemption Number 4 (5 U.S.C. 552(b)(4))** permits trade secrets and other confidential business information furnished to VA from outside the Government to be withheld. The following steps will be followed when a request for business information is received:

(a) Provide the business submitter with written notification that a FOIA request has been received for this type of information, unless it is readily determined that the information should not be released or that the information has been lawfully published or made public.

(b) Allow the business submitter a specified and reasonable time period in which to object to the disclosure and to provide full explanation of why disclosure is opposed.

(c) Consider any objections provided by the submitter and decide whether to release the information. If the information is to be released over the objections of the submitter, provide the submitter with a detailed explanation.

(d) Provide the submitter with the release decision prior to actually releasing the information. This notice will allow the submitter the opportunity to consider any judicial action that might be taken to prevent release of the records.

(5) **Exemption Number 5 (5 U.S.C. 552(b)(5))**. If VA can articulate that the Department would be harmed by releasing records, exemption number 5 permits withholding records that are "deliberative." The deliberative process privilege applies only to pre-decisional documents of a deliberative nature. If a document actually reflects a VA decision or final opinion, it is clearly not pre-decisional and not exempt from release under this exemption. This exemption cannot be cited to withhold a document that is pre-decisional, yet referred to and incorporated into a later decision document. It does not apply to purely factual parts of a document, but only to those portions reflecting advice, recommendations, and options. This exemption also permits withholding documents that are covered by other privileges, such as attorney-client or attorney-work-product privileges.

(6) **Exemption Number 6 (5 U.S.C. 552(b)(6))** permits withholding records and information about individuals, the disclosure of which would be a "clearly unwarranted invasion of personal privacy." To be covered, (a) information must be about an identifiable individual; (b) the disclosure would be an invasion of the individual's personal privacy if disclosed to others; and (c) it is determined that the public interest does not outweigh the privacy interest. (Information is in the public interest if it sheds light on a Federal agency's performance of its statutory duties.) VA claims records, medical records, and personnel files (pertaining to living individuals) are among many Department records that contain information that can be withheld under this exemption.

(7) **Exemption Number 7 (5 U.S.C. 552(b)(7))** permits withholding investigatory records or information compiled for law enforcement purposes, but only to the extent that one of six types of harmful circumstances is present. These are as follows:

- (a) Interference with law enforcement proceedings can be reasonably expected;
- (b) A person would be deprived of a fair trial or an impartial adjudication;
- (c) An unwarranted invasion of personal privacy could reasonably be expected;
- (d) Revealing a confidential source and information could reasonably be expected;
- (e) Techniques and procedures for law enforcement investigations or prosecutions would be disclosed or guidelines for law enforcement investigations or prosecutions would be disclosed, provided such disclosure could reasonably be expected to risk circumvention of the law; and
- (f) Endangering the safety or life of any individual could reasonably be expected.

(8) **Exemption Number 8 (5 U.S.C. 552(b)(8))** permits withholding records relating to the examination of banks and other financial institutions by agencies that regulate or supervise them.

(9) **Exemption Number 9 (5 U.S.C. 552(b)(9))** permits withholding records relating to geological and geophysical information and data, including maps, concerning wells.

## 5. REVIEWING RECORDS BEFORE RELEASE

a. **General.** Before releasing records in response to a FOIA request, the records will be reviewed to determine if all or only parts can be released. The process of editing or deletion is referred to as "segregation" or "redaction." This process sometimes requires a time-consuming review of a large number of documents to delete those portions that have not been requested or that are exempt. Nevertheless, it must be performed in accordance with VA's responsibility to make those disclosures that are required or expected and to avoid making improper disclosures.

b. **Discretionary Disclosure.** If a record may be withheld, a determination will be made as to whether the record can be disclosed on a discretionary basis. The FOIA Officer/reviewer should assert a FOIA exemption only in those cases where VA reasonably foresees that disclosure would be harmful or when a statute precludes disclosure.

c. **Deletions.** If information is deleted, the specific FOIA exemption(s) permitting the deletion and the actual deletion must be identified on the released portion of the record. Furthermore, if not apparent from the released portion of the record, the amount of the material withheld must be provided and the basis for that withholding should also be provided (i.e., “15 pages of requested material were withheld in its entirety in accordance with 5 U.S.C. 552(b)(6).”).

d. **Electronic Records.** On records released in an electronic format, the amount of information deleted must be indicated on the released portion of the record at the place in the records where such deletion is made, if technically feasible. The amount of information deleted must be indicated, unless that indication would harm an interest protected by the exemption under which the deletion is made.

## 6. APPEAL OF INITIAL DENIAL

The VA official who responds to a request will notify the requester of the right to appeal and will encourage the requester to file the appeal within 60 days of any initial decision to deny a request. The requester should be advised that the letter of appeal should state clearly why the requester disagrees with the determination to withhold records and be addressed to: General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. The final VA decision will be made by the General Counsel or the Deputy General Counsel.

## 7. FEES FOR PROCESSING FOIA REQUESTS

a. Fees will be charged for processing FOIA requests for records or waived in accordance with VA regulation 38 CFR 1.555.

b. The office releasing the records is responsible for assessing, collecting and depositing fees.

c. Payments may be by check or money order made payable to the Department of Veterans Affairs.

d. Payments must be deposited with the Agent Cashier. The office depositing the check must make sure that the payment is identified as a FOIA payment.

## 8. ANNUAL REPORT

a. **General.** FOIA requires each agency to submit an annual report of its activities and efforts to administer FOIA during the preceding fiscal year. Reports Control Number (RCN) 72-0408 is assigned to this report. All offices will report statistics derived from replies they provided to requesters. Offices will not report information or records provided to another office for reply to the requester.

b. Field facilities will submit their information to their respective Central Office FOIA Officer.

c. Central Office organizational elements will submit a consolidated report, which compiles the data for all field facilities under their jurisdiction as well as their Central Office element, to Information Management Service (045A4).

d. Instructions for submitting the report will be issued annually by Information Management Service.

F. **Consolidation and Submission.** The Information Management Service will consolidate the reports from all organizational components and prepare the Department's annual report. The report will be submitted to the Department of Justice by February 1 of each year.

## 9. DEFINITIONS

a. **Department Record.** Documentary material (regardless of form or format, such as paper, electronic records, microfiche) made or received by VA and preserved as evidence of VA's organization, functions, policies, decisions, procedures, or operations. A record must exist at the time the request is received. It must be in the possession and control of VA to be subject to FOIA. A record is not a Department record if it is maintained and used only by the individual who created or received it; if there is no regulation, policy, or procedure that requires its creation or maintenance; if it is not circulated to anyone, including a secretary to type or file; and if it can be legally disposed of or destroyed at any time by the individual who maintains it. For purposes of FOIA, examples of records that are not Department records are handwritten drafts of letters, notes taken at a meeting that are used only by the note-taker, and "memory jogger" notes on employee performance. FOIA does not require a record to be created or analyzed to answer a request. There may be other reasons to create information or records to answer requests, but it is not a FOIA requirement.

b. **FOIA Request.** A written request that includes the signature of the requester and reasonably describes the records being sought. The request may be addressed to the FOIA Office(r).

(1) VA may process a faxed request as long as the request bears a signature. VA reserves the right to request proof of identity under certain circumstances such as when the records implicate the personal privacy interest of the requester.

(2) Requests received by telegram or e-mail do not meet the "over the signature of the requester" requirement of 38 CFR 1.553(b).

c. **Any Person.** Under FOIA, any person includes foreign citizens, partnerships, corporations, associations, and foreign, state and local governments, but not Federal government agencies, who request records.

d. **Any Reason.** Requesters do not have to state a reason for FOIA requests. However, if they request fee waivers, it is appropriate to ask for their purpose.

e. **Reasonably Described.** A description of the records sought is considered sufficient if it enables a professional employee who is familiar with the subject matter to locate the record in a reasonable period of time.

f. **Search.** To review, manually or by automated means, agency records in order to locate records that are responsive to a request.